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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General

The Secretary-General has the honour to transmit to members of the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, submitted in accordance with General Assembly resolution 64/168 and Human Rights Council resolution 13/26.

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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Summary

The present sixth and final report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism addresses (in section II), the question of compliance with human rights by the United Nations when countering terrorism. After a brief account of the activities of the Special Rapporteur between November 2009 and July 2010 (section I), the report takes stock of and assesses the role and contributions of, inter alia, the Assembly, the Counter-Terrorism Implementation Task Force, the Human Rights Council, the Security Council and its subsidiary bodies, and United Nations field presences in the promotion and protection of human rights in the context of their counter-terrorism activities.

The main recommendation contained in the report is that the Security Council should seize the opportunity of the approaching tenth anniversary of its resolution 1373 (2001) to replace resolutions 1373 (2001), 1624 (2005) and 1267 (1999) (as amended) with a single resolution, not adopted under Chapter VII of the Charter of the United Nations, in order to systematize the States' counter-terrorism measures and reporting duties of States under one framework. This proposal is motivated by the assessment of the Special Rapporteur that Chapter VII does not provide the proper legal basis for maintaining the current framework of mandatory and permanent Security Council resolutions of a quasi-legislative or quasi-judicial nature.

The report also addresses ways and means of improving the human rights accountability of the United Nations for its field operations, including in the context of countering terrorism, as well as the contributions of various actors in the implementation of the 2006 United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288).

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I. Introduction

1. The present report is the sixth and final report to the General Assembly by the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, submitted pursuant to General Assembly resolution 64/168 and Human Rights Council resolution 13/26. The focus of the report is the promotion and protection of human rights and fundamental freedoms in the counter-terrorism activities of the United Nations.[1]

2. Regarding planned country visits, the Special Rapporteur has been invited to undertake a mission to Peru in September 2010 and would like to thank the Government in that regard. In addition, the Government of Iceland has invited the Special Rapporteur for consultations during the same month.

3. There are outstanding visit requests for Algeria, Chile, Malaysia, Pakistan, the Philippines, the Russian Federation and Thailand as well as a follow-up visit request to Egypt.

II. Activities of the Special Rapporteur

4. From 22 to 26 January 2010, the Special Rapporteur conducted a visit to Tunisia, at the invitation of the Government. The Special Rapporteur had discussions with the Ministers for Foreign Affairs and for Justice and Human Rights, with Ministry of Interior officials, judges, parliamentarians, the High Committee on Human Rights and Fundamental Liberties, representatives of the international community, lawyers, academics and non-governmental organizations, including human rights organizations and organizations of victims of terrorism, regarding the anti-terrorism law and practice of the country. He visited the Bouchoucha police detention facility and the Mornaguia prison, where he interviewed several persons suspected of or convicted for terrorist crimes. The Special Rapporteur will present his report on the visit to the Human Rights Council.

5. On 8 February 2010, the Special Rapporteur met with the Ambassador of Tunisia and representatives of the Permanent Missions of Mexico and Peru to the United Nations. The Special Rapporteur also held a meeting with the President of the Human Rights Council.

6. On 22 and 23 February 2010, the Special Rapporteur was represented at a Counter-Terrorism Implementation Task Force workshop on countering terrorist use of the Internet, held in Richmond/Bellevue, Washington, United States of America.

7. On 1 and 2 March 2010, an expert workshop was held on good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, with the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and in conjunction with the Geneva Centre for the Democratic Control of Armed Forces.

[1] The Special Rapporteur is grateful to Lisa Ginsborg, consultant, and Nikolas Kyriakou, both PhD researchers at the European University Institute, and to the Office of the United Nations High Commissioner for Human Rights for their assistance in preparing the report.

8. On 8 March 2010, the Special Rapporteur presented his annual report, focusing thematically on the right to privacy (A/HRC/13/37), the report containing communications to and from Governments (A/HRC/13/37/Add.1) and the report on the mission to Egypt (A/HRC/13/37/Add.2) to the Human Rights Council at its thirteenth session.

9. On 30 and 31 March 2010, the Special Rapporteur met with the Ambassadors of Mexico and Thailand, and with representatives of the Permanent Mission of the Russian Federation to the United Nations.

10. On 31 March 2010, a questionnaire requesting information on good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, was sent to all Member States. On 15 April 2010, the Special Rapporteur held a public consultation on such good practices with Member States, of which 49 attended.

11. On 1 June 2010, the Special Rapporteur presented to the Human Rights Council the report on good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight (A/HRC/14/46 and Add.1).

12. On 2 and 3 June 2010, the Special Rapporteur, jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Vice-Chair of the Working Group on Arbitrary Detention, presented the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42) to the Human Rights Council at its fourteenth session.

13. During that period, the Special Rapporteur met with the Ambassadors of Egypt and Tunisia, the Deputy-Ambassador of the Philippines and the Ambassador and Representative of the United States of America to the Human Rights Council.

14. With a view to the preparation of the sixth and final report of the Special Rapporteur to the Human Rights Council, on 21 June 2010, the Office of the United Nations High Commissioner for Human Rights sent a questionnaire to all Member States on best practices on legal and institutional frameworks and measures that ensure respect for human rights while countering terrorism. The identification and dissemination of such practices will be the main theme of the forthcoming report of the Special Rapporteur to the Council.

15. From 28 June to 2 July 2010, the Special Rapporteur attended the seventeenth annual meeting of special procedures of the Human Rights Council, held in Geneva.

16. On 29 and 30 July 2010, the Special Rapporteur participated in a stakeholder retreat on the United Nations counter-terrorism programme, convened by the Center on Global Counterterrorism Cooperation at Greentree Estate, Manhasset, New York, United States.

III. Compliance by the United Nations with international human rights law while countering terrorism

17. In order to respond to the pressing problems posed by terrorism, the functions of the United Nations have evolved in a manner that was not anticipated at its inception. This brings to the fore the human rights responsibility of the United Nations as an international organization and the possibility of their violation in the discharge of its duties.[2] Although the United Nations is not formally a party to any international human rights instrument, there are several arguments that support the applicability of human rights to it, including: (a) the United Nations is a subject of international law and therefore bound by customary international law; (b) the United Nations, by means of its constitutional mandate, particularly Articles 1 (3), 24 (2) and 55 (c) of the Charter, is obliged to abide by human rights;[3] (c) the United Nations is bound by extension of the responsibility of its members; and (d) human rights obligations exist on account of the adoption of the Universal Declaration on Human Rights, treated by many as an authoritative interpretation of human rights obligations under the Charter. It has been correctly asserted that it would be odd indeed to hold that the organization from which the international protection of human rights originated and which still looks at their protection as one of its fundamental goals, be exempted from the obligation to respect them.[4] As the actual problem may rather be in the absence of adequate procedures for holding the United Nations to account than in the absence of substantive legal obligations, the creation of a World Court of Human Rights with jurisdiction over the United Nations and its organs has been proposed as a solution.[5]

A. General Assembly

18. The General Assembly has played a pioneering role in the global struggle against international terrorism, as well as in drawing attention to the human rights implications of terrorism and of counter-terrorism measures. In recent years, in the framework of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 and the working group of the Sixth Committee, the Assembly has continued its work in the field of codifying international law on terrorism. The increasing attention by the Assembly to the promotion and protection of human rights while countering terrorism is reflected in a number of resolutions adopted on the subject, including the United Nations Global Counter-Terrorism Strategy.

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[2] See A/64/10, text of the draft articles on responsibility of international organizations.

[3] Frédéric Mégret and Florian Hoffman, "The United Nations as a human rights violator? Some reflections on the United Nations changing human rights responsibilities", *Human Rights Quarterly*, vol. 25, No. 2 (May 2003), p. 317; and René Cassin, "La déclaration universelle et la mise en oeuvre des droits de l'homme" in *Recueil des cours* (1951-II) Académie de droit international, vol. 79.

[4] Andrea Bianchi, "Security Council's anti-terror resolutions and their implementation by Member States", *Journal of International Criminal Justice*, vol. 4, issue 5 (2006), p. 1062.

[5] See the Swiss Initiative research project on A world human rights court, in particular draft statutes in Martin Scheinin "Towards a world court of human rights", and Manfred Nowak and Julia Kozma "A world court of human rights", both available from: http://www.udhr60.ch/research.html.

1. The United Nations Global Counter-Terrorism Strategy

19. The United Nations Global Counter-Terrorism Strategy was adopted by the General Assembly in its resolution 60/288 as the first comprehensive, collective and internationally approved framework for tackling the problem of terrorism worldwide. The defence of human rights and upholding the rule of law while countering terrorism featured prominently in the report of the Secretary-General on recommendations for a global counter-terrorism strategy (A/60/825), and the plan of action of the Strategy recognizes that any measure taken to prevent and combat terrorism must comply with international law, including the Charter of the United Nations, and in particular human rights law, refugee law and humanitarian law (see General Assembly resolution 60/288, annex, para. 3).

20. Measures to ensure respect for human rights for all and the rule of law forms one of the four pillars of the Strategy and at the same time a component in all other pillars (ibid., sect. IV). The title of the fourth pillar identifies this principle as the fundamental basis of the fight against terrorism. The Strategy recognizes that it is necessary to address the long-term structural conditions conducive to the spread of terrorism, which include: prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance (ibid., sect. I). The Strategy calls for action to combat these conditions while it makes clear that none of the conditions can excuse or justify terrorism.

21. The Strategy represents a clear affirmation by Member States that effective counter-terrorism measures and the protection of human rights are not conflicting, but complementary and mutually reinforcing goals and that human rights and the rule of law are the fundamental basis of their counter-terrorism strategies. While the main responsibility for implementing the Strategy falls on Member States, the Strategy calls on the United Nations system to provide support and reaffirms the important role of the United Nations system in strengthening the international legal architecture by promoting the rule of law, respect for human rights and effective criminal justice systems (ibid., sect. IV.5). Furthermore, in reaffirming the Strategy in 2008, the General Assembly called upon United Nations agencies involved in supporting counter-terrorism efforts to continue to facilitate the promotion and protection of human rights and fundamental freedoms while countering terrorism (General Assembly resolution 62/272, para. 7).

22. The Special Rapporteur is concerned that the centrality of the respect for human rights and the rule of law as the fundamental basis of the fight against terrorism set out in the Strategy is often not translated into counter-terrorist practice within the United Nations system and at the national level. In its focus on prevention and conditions conducive to terrorism, the Strategy offers the possibility to stimulate a more comprehensive international response to terrorism, which should not be limited to traditional counter-terrorism actors, and includes United Nations agencies that traditionally have not worked in the area of counter-terrorism, as well as United Nations country teams.[6]

[6] Eric Rosand, From adoption to action: the United Nations' role in implementing its Global Counter-Terrorism Strategy, Center on Global Counterterrorism Cooperation policy brief (April 2009).

2. Other resolutions

23. The General Assembly has adopted over 60 resolutions on international terrorism. In 1993, the Assembly adopted its first resolution on the subject of human rights and terrorism (General Assembly resolution 48/122), in which it underlined that the right to life was the most essential and basic human right. In 1995, for the first time, it affirmed that all measures to counter-terrorism should be in strict conformity with international human rights standards (General Assembly resolution 50/186). Since 2003, the Assembly has adopted annual resolutions on the protection of human rights and fundamental freedoms while countering terrorism, which have increasingly dealt with specific human rights questions that might arise while countering terrorism.[7] After the establishment of the mandate of the Special Rapporteur, these resolutions have often made reference to his reports and taken up some of his recommendations.

24. While reminding States to ensure that measures taken to combat terrorism comply with their obligations under international law, in particular international human rights, refugee and humanitarian law, and emphasizing the prescribed limits to any derogations from human rights (see General Assembly resolution 57/219), the General Assembly has turned its attention to a number of specific human rights standards that must be respected by States in their counter-terrorism measures. These include:[8]

- Legality in criminalization of terrorism — States must ensure that laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory and non-retroactive (see resolution 63/185, para. 18).
- Non-discrimination — counter-terrorism measures should be implemented in full consideration of minority rights and must not be discriminatory on the grounds of race, colour, sex, language, religion or social origin (see resolution 61/171, para. 5); States should not resort to profiling based on discriminatory stereotypes (see resolution 63/185).
- Due process guarantees — States must ensure due process guarantees, consistent with all relevant provisions of international law (ibid., para. 12), to respect the right of persons to equality before the law, courts and tribunals and to a fair trial (see resolution 64/168, para. 6 (e)) and to ensure that any person whose human rights or fundamental freedoms have been violated has access to an effective remedy and that victims receive adequate reparations (ibid., para. 6 (n)).
- Deprivation of liberty and prohibition of torture — States must respect the liberty, security and dignity of the person, treat all prisoners in all places of detention in accordance with international law (see resolution 61/171, para. 8) and fully comply with their obligations with regard to the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (see resolution 63/185, para. 8).
- Non-refoulement obligations of States — States must ensure that border control and pre-entry mechanisms fully respect their obligations towards

[7] Bibi van Ginkel, *The Practice of the United Nations in Combating Terrorism from 1946 to 2008: Questions of Legality and Legitimacy*.

[8] References in paragraph 24 are to General Assembly resolutions.

persons seeking international protection (see resolution 62/159, para. 8); States must refrain from returning persons, including in cases related to terrorism, to their countries of origin or to a third State whenever such transfer would be contrary to their obligations under international law (ibid., para. 7).

- Economic, social and cultural rights — States should protect all human rights, including economic, social and cultural rights, bearing in mind that certain counter-terrorism measures may have an impact on the enjoyment of those rights (see resolution 64/168, para. 6 (f)).

25. The issue of a draft comprehensive convention on international terrorism was referred in 2001 to the Ad Hoc Committee and continues to be pursued by States, including after the call by the General Assembly in the 2005 World Summit Outcome (resolution 60/1) for the adoption of the convention by the General Assembly during its sixtieth session.[9] The Special Rapporteur has warned that calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, can give rise to adverse consequences for human rights (see E/CN.4/2006/98). The strong emphasis on counter-terrorism throughout the United Nations system risks giving unintended international legitimization for conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against "terrorism", however defined.

3. Counter-Terrorism Implementation Task Force

26. The Counter-Terrorism Implementation Task Force was established by the Secretary-General in July 2005. It works to ensure coordination and coherence among United Nations entities involved in counter-terrorism efforts and aims to catalyse and mobilize the counter-terrorism efforts of various United Nations system entities to assist Member States in implementing the United Nations Global Counter-Terrorism Strategy. The Special Rapporteur has provided input and has participated in a number of Task Force working groups, which are tasked with implementation of the strategy, in particular the working group on supporting and highlighting victims of terrorism, the working group on countering the use of the Internet for terrorist purposes and the working group on protecting human rights while countering terrorism.

27. In the context of supporting victims of terrorism, the Special Rapporteur has emphasized the importance of providing material, legal and psychological assistance to victims of terrorism, who have suffered serious violations of their basic rights (see A/HRC/10/3/Add.2, paras. 44-46), and the importance of bringing the perpetrators of terrorist acts to justice (see E/CN.4/2006/98, para. 66).

28. While recognizing the importance of coordinating efforts to counter-terrorism on the Internet, and with reference to the report of the respective Task Force working group,[10] the Special Rapporteur reminds States that it is imperative that any measures aimed at policing and reducing terrorism-related activities or content on the Internet be carried out with full respect for human rights, and that any

[9] See in particular the report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 at its fourteenth session, A/65/37.

[10] See the report of the working group, February 2009. Available from: http://www.un.org/terrorism/pdfs/wg6-internet_rev1.pdf.

restriction be prescribed by law, in pursuit of a legitimate purpose, and respect the principles of necessity and proportionality.[11]

29. The working group on protecting human rights while countering terrorism has started to deliver practical tools to assist Member States in strengthening the protection of human rights in the context of counter-terrorism in selected specific areas.[12] The Special Rapporteur encourages Member States and other actors to make use of these and other available tools such as the OHCHR fact sheet on human rights, terrorism and counter-terrorism,[13] the Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism,[14] and existing thematic reports by the Special Rapporteur.[15]

30. The Special Rapporteur considers it essential that human rights issues be mainstreamed throughout the Task Force, in line with the United Nations Global Strategy, and that each working group incorporate a human rights component and perspective.[16] The current structure of the Task Force may otherwise run the risk of reinforcing the existing stovepiped approach to the protection of human rights standards in the counter-terrorist action of the United Nations system.[17] While the establishment of the mechanism of Integrated Assistance for Countering Terrorism[18] is a promising step to coordinate technical assistance by different United Nations actors, full integration of human rights issues requires continued effort.

4. Human Rights Council

31. In 2004, a one-year mandate of an Independent Expert was established to explore the human rights dimension of counter-terrorism measures (see Commission on Human Rights resolution 2004/87), and on the basis of his recommendations (see E/CN.4/2005/103), the Commission on Human Rights in 2005 established the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[19]

32. The United Nations High Commissioner also continues to report to the Human Rights Council on issues related to human rights and counter-terrorism.[20] The degree of coordination between the respective reports by the Special Rapporteur and the United Nations High Commissioner has varied over the years. The annual resolutions of the Human Rights Council have referred to both reports. Following

[11] Ibid., para. 84. See also Council of Europe recommendation CM/Rec(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters (adopted by the Committee of Ministers on 26 March 2008).

[12] See outcome note from workshop on the development of practical tools, September 2008. Available from: http://www.un.org/terrorism/pdfs/Web-Developing%20Practical%20Tools.pdf.

[13] See Fact Sheet No. 32, "Human rights, terrorism and counter-terrorism". Available from: http://www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/FactSheets.aspx.

[14] Available from: http://www.ohchr.org/Documents/Publications/DigestJurisprudenceen.pdf.

[15] Available from: http://www2.ohchr.org/english/issues/terrorism/rapporteur/reports.htm.

[16] Eric Rosand, Alistair Millar and Jason Ipe, "Human rights and the implementation of the United Nations Global Counter-Terrorism Strategy: hopes and challenges" (Center on Global Counterterrorism Cooperation, 2008), p. 21.

[17] Ibid., p. 3.

[18] See http://www.un.org/terrorism/i-act.shtml.

[19] See Commission on Human Rights resolution 2005/80, subsequently renewed and modified in Human Rights Council resolution 6/28.

[20] See, for example, A/HRC/13/36, A/HRC/12/22, A/HRC/8/13, A/HRC/4/88.

the good practices of human rights treaty bodies, the Council has, in the context of its universal periodic review of States' human rights compliance, systematically recommended measures for States to ensure human rights compliance in countering terrorism.

B. Security Council

1. The regime pursuant to resolution 1373 (2001) and the Counter-Terrorism Committee

33. The Counter-Terrorism Committee was established pursuant to Security Council resolution 1373 (2001), in the immediate aftermath of the terrorist attacks of 11 September 2001. Acting under Chapter VII of the Charter, the Security Council identified a number of Member State obligations in countering terrorism and established the Counter-Terrorism Committee for the purpose of monitoring, including by considering State reports, the implementation of the resolution.

34. Pursuant to resolution 1373 (2001), the Security Council for the first time imposed on all States Members of the United Nations a number of general, permanent obligations, not connected to a specific conflict situation. In effect, this type of action amounts to the Council establishing new binding rules of international law. The obligations laid out in resolution 1373 (2001) contain no end in time or geography and apply to any act of terrorism worldwide. As a result, it has been contested whether it was the prerogative of the Council to take this type of de facto legislative measure.[21]

35. As an organ of an international organization, the Security Council is bound by its constituent instrument, the Charter. The Charter, in particular its Chapter VII, provides the foundation for and limit to action by the Security Council. Moreover, Article 24 (2) demands that the Council act in accordance with the purposes and principles of the United Nations (which include, in Article 1 (3), the promotion of and respect for human rights) when discharging its duties.

36. Article 39 of the Charter regulates the determination by the Security Council of the existence of a threat to peace, breach of peace, or act of aggression. On the basis of this determination, the Council may decide what measures may be taken to maintain or restore international peace and security, including measures not involving the use of armed force, under Article 41 of the Charter. While the Council is granted a great deal of discretion to determine what amounts to a threat to peace, this determination must always be linked to a specific concrete situation as opposed to an abstract problem or hypothetical future situation.[22] Moreover, measures taken by the Council under Chapter VII should be taken on a case-by-case basis according to the principle of proportionality. The Council should use its exceptional powers

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[21] Bjorn Elberling, "The ultra vires character of legislative action by the Security Council", in *International Organizations Law Review*, vol. 2(2).

[22] See Matthew Happold, "Security Council resolution 1373 (2001) and the constitution of the United Nations", in *Leiden Journal of International Law*, vol. 16 (2003); Valeria Santori, "The United Nations Security Council's (broad) interpretation of the notion of the threat to peace in counter-terrorism", in *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Giuseppe Nesi, ed. (Hampshire, United Kingdom, Ashgate Publishing Limited, 2006).

solely to take measures deemed indispensable to countering a specific concrete situation that is posing a threat to international peace and security.

37. The inherent limits to the powers of the Security Council under Chapter VII are more pressing in the light of the persistent problem of the lack of a universal, comprehensive and precise definition of "terrorism" (see E/CN.4/2006/98). The Special Rapporteur considers it problematic for binding permanent measures to be imposed by the Council on all Member States on the basis of hypothetical future acts falling under such a controversial and internationally undefined notion as terrorism.

38. The question of whether the Security Council, when adopting resolution 1373 (2001), acted within the powers assigned to it by the Charter is also tied to the notion of separation of powers between the different United Nations bodies, in particular between the Security Council and the General Assembly.[23] The Security Council has the primary responsibility for the maintenance of international peace and security in specific situations. It lacks the competence to encourage the progressive development of international law and its codification since this task is explicitly assigned to the Assembly in the Charter (Article 13 (1)). Since 2001, there has been rapid progress in State ratifications of the International Convention for the Suppression of the Financing of Terrorism, resulting in a proper legal basis for States' obligations in this field even without a Chapter VII resolution by the Security Council.[24] Further, the composition and procedures of the Security Council are ill-suited to the imposition of permanent general obligations on all Member States.[25]

39. For the reasons above, the Special Rapporteur considers that whatever justification the Security Council may have had in September 2001 for the adoption of resolution 1373 (2001), its continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. The implementation of resolution 1373 (2001) goes beyond the powers conferred on the Council and continues to pose risks to the protection of a number of international human rights standards.

40. As noted in the first report of the Special Rapporteur considered by the Human Rights Council in 2006 (see E/CN.4/2006/98, para. 52), resolution 1373 (2001) makes only one passing reference to human rights, in a very specific context. However, in its resolution 1624 (2005), the Security Council explicitly confers a human rights mandate upon the Counter-Terrorism Committee in the implementation of the resolution. Resolutions 1456 (2003) and 1535 (2004) prescribe that States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.

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[23] See Martti Koskenniemi, "The police in the Temple: order, justice and the United Nations: a dialectical view", in *European Journal of International Law*, vol. 6 (1995).

[24] By September 2001, only four States had ratified the Convention, which was yet to enter into force. Today, there are 173 States parties to the treaty.

[25] A similar conclusion is reached in the report entitled "The United Nations and the new threats: rethinking security", which summarizes the results of the High-level Panel on Threats, Challenges and Change held in Rome in May 2004 and organized by the United Nations Foundation.

41. Since then, the formulation of this so-called human rights clause has evolved. Both Security Council resolution 1822 (2008) and General Assembly resolution 62/272 also refer to action by the United Nations itself, indirectly also that recognizing United Nations action to counter terrorism must fully comply with international law, including human rights law, refugee law and international humanitarian law.

42. The Special Rapporteur has welcomed the 2006 conclusions for policy guidance regarding human rights and the Counter-Terrorism Committee (S/AC.40/2006/PG.2), which guide the Counter-Terrorism Committee Executive Directorate to include international human rights standards in its daily work. He notes with appreciation that the Committee is now committed to include human rights elements in its assessment of Member State compliance with resolution 1373 (2001) and in its technical assistance to Member States. This represents an important shift from the initial stages of work of the Committee.

43. The Special Rapporteur remains alert to the fact that this commitment needs to be translated into the practice of the Committee. In his first report considered by the Human Rights Council in 2006 (see E/CN.4/2006/98, paras. 57-62), the Special Rapporteur presented the findings of a study of roughly 640 reports submitted by Member States pursuant to resolution 1373 (2001), in the period from the establishment of the Committee until November 2005, to assess the human rights implications of the questions and comments to Member States by the Committee. The Special Rapporteur has now conducted a similar study on the approximately 100 reports submitted by Member States pursuant to resolution 1373 (2001) in the period from November 2005 to May 2010. From an examination of the Committee's comments and questions, as reproduced in subsequent reports by the States concerned, the Special Rapporteur found patterns similar to those in his previous study. Again, there were a few instances in which the Committee had been explicitly promoting responses that took due account of human rights standards.[26]

44. On the other hand, while the Committee never appeared to have posed questions that were openly in opposition with international human rights standards, there were many instances in which the questions posed seemed to promote counter-terrorism measures which, in the absence of necessary safeguards, could interfere with the enjoyment of specific human rights. The Committee may thereby appear to be insensitive to a number of potentially affected rights and risks giving States the impression that turning a blind eye to international human rights standards is acceptable in this context. While the situation may, in fact, be better under confidential country-specific work, including country visits, what is publicly available from the consideration of State reports leaves room for improvement in a number of key areas, such as guarantees of due process that should accompany the freezing of the funds suspected of being linked to terrorism;[27] the right to seek asylum and to non-refoulement obligations, with often too broad an approach being taken by the Committee and States on the issue of exclusion, suggesting that

[26] For instance, see the question posed by the Committee in the report submitted by Canada (S/2006/185, enclosure, section 1.5).

[27] See, for example, the report submitted by Brunei Darussalam (S/2007/302, enclosure, section 1.3).

national security or public order are sufficient grounds to exclude a refugee;[28] and the right to privacy.[29] Another right potentially at risk is freedom of association, with the Committee asking questions about States monitoring the activities of charitable organizations and non-governmental organizations, without mention of international freedom of expression and freedom of association standards.[30] The Committee may risk providing oppressive States with further pretexts to crack down on human rights defenders. Finally, there is no public record of the interest on the part of the Committee in curtailing politically inspired over-inclusive national definitions of terrorism that pose a threat both to human rights and to the efficiency of proper counter-terrorism measures.

45. The Special Rapporteur has also examined the State reports submitted pursuant to resolution 1624 (2005). The Committee transmitted to all Member States a series of standard questions (see S/2006/737, para. 2), which included a question in connection with what States were doing to ensure that their measures to implement resolution 1624 (2005) complied with their obligations under international law, in particular international human rights law, refugee law, and humanitarian law. While this practice sends States a message concerning the importance of upholding international law in their counter-terrorism efforts, it does not provide real guidance on the specific human rights standards involved. While a number of States provided details of the specific human rights provisions upheld in their implementation of resolution 1624 (2005) (ibid., section VII), often States answered the question by simply providing a list of the human rights treaties they had ratified,[31] provided some form of generic statement,[32] or did not answer the question at all.[33]

46. The two reports released by the Committee on the implementation of resolution 1624 (2005) (S/2006/737 and S/2008/29) provide a detailed account of the trends in the measures States have taken to implement the resolution, including how States have responded to the standard question on compliance with international law. However, this account of State practice avoids taking a position on the measures' conformity with international law, or highlighting the human rights shortcomings connected to the implementation of resolution 1624 (2005). For instance, the Special Rapporteur notes with concern that in its first report on the implementation of the resolution, the Committee reported that a number of States

[28] See, for example, the reports submitted by Samoa (S/2006/152, enclosure, para. 3 (a), and Myanmar (S/2006/902), enclosure, section 1.13). For an account of the challenges to refugee law and asylum caused by global measures to counter terrorism, see the 2007 report of the Special Rapporteur (A/62/263).

[29] See E/CN.4/2006/98, para. 60. See also the reports submitted by Colombia (S/2006/423, enclosure, section 1.7), Singapore (S/2006/120, enclosure, section 1.8), India (S/2007/196, enclosure, section 1.8) and Seychelles (S/2006/545, enclosure, section 1.11). For an account of the privacy issues involved, see the 2009 report of the Special Rapporteur (A/HRC/13/37, para. 30).

[30] See, for example, the reports submitted by Libya (S/2006/471, enclosure, section 1.11) and Palau (S/2005/823, enclosure, section 1.5).

[31] See, for example, the report submitted by Seychelles (S/2006/545, enclosure, section 2.6).

[32] See, for example, the reports submitted by Bahrain (S/2007/772, enclosure, section 2.6) and China (S/2006/470, enclosure, para. 2.6).

[33] See, for example, the report submitted by the Republic of Korea (S/2006/445, enclosure, section 2.6). In its second report to the Security Council on the implementation of resolution 1624 (2005), the Committee found that approximately half of the States reporting since 7 September 2006 had provided information on how they sought to ensure compliance with paragraph 4 of the resolution (S/2008/29, para. 28).

had criminalized the "glorification" or "apology" of terrorism, without mentioning the human rights concerns that go hand-in-hand with this trend.[34] The Special Rapporteur is concerned that as a result the Committee may be perceived as uncritically receiving reports and thereby accepting the application of measures which may undermine international human rights standards.

47. Notwithstanding the problems with its reporting regime, the Committee has moved away from a focus on collecting, reviewing and requesting reports by States, to different methods of work as the primary tools for assessing implementation by countries of resolution 1373 (2001), such as country visits[35] and the development of preliminary implementation assessments — country-specific analyses provided by the Counter-Terrorism Committee Executive Directorate on the implementation of resolution 1373 (2001).[36] The updated working methods encourage greater focus on implementation by States as the basis of a tailor-made dialogue and less on reporting as such (see S/2006/989, section III). While these changes in the working methods of the Committee constitute a positive shift in moving from assessing the "paper truth" to the "ground truth" regarding implementation of the resolution,[37] the non-public nature of the preliminary implementation assessments and the findings from country visits make the task of assessing the human rights conformity of Committee action difficult.

48. The United Nations High Commissioner for Human Rights has, since 2002, regularly briefed the Committee and raised many important human rights issues, including diplomatic assurances, renditions, individual sanctions and their reform initiatives. In addition, the Special Rapporteur appreciates having had the opportunity to brief the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate. The Committee has held a number of debates on issues related to human rights.

49. The Special Rapporteur welcomes the inclusion of a section on human rights in the annual global surveys on the implementation of resolution 1373 (2001) compiled on the basis of the preliminary implementation assessments, and the priority recommendations related to human rights for future action by the Counter-Terrorism Committee (see S/2008/379, para. 166, and S/2009/620, para. 130). In order for the human rights commitments of States to be translated into practice, the human rights message conveyed by the Committee and the Counter-Terrorism Committee Executive Directorate to States in their assessments of the implementation of resolution 1373 (2001) needs to be specific to each area of implementation.

50. The Special Rapporteur identifies as a best practice in this regard the 2009 technical guide to the implementation of Security Council resolution 1373 (2001),

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[34] See S/2006/737, section II. As expressed by the Special Rapporteur in his report (E/CN.4/2006/98, para. 56 (c)), a sound response to this trend in respect of human rights standards can be found in the Council of Europe Convention on the Prevention of Terrorism which, in its article 5, includes a definition of "public provocation" of terrorism, based on a double requirement of a subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed.

[35] See framework document for Counter-Terrorism Committee visits to States (8 February 2005).

[36] See updated working methods of the Committee (17 October 2006).

[37] See Eric Rosand, "Security Council resolution 1373 (2001), the Counter-Terrorism Committee, and the fight against terrorism", in *The American Journal of International Law*, vol. 97, No. 2 (April 2003).

which contains specific human rights guidelines in relation to the specific provisions of the resolution, and can serve to guide States towards implementing the resolution in conformity with international human rights standards.

2. The sanctions regime pursuant to resolution 1267 (1999)

51. The mandate of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities is to oversee the implementation of sanctions imposed on Taliban-controlled Afghanistan for its support and harbour of Usama bin Laden. The sanctions regime has been modified by subsequent resolutions,[38] all adopted under Chapter VII of the Charter so that the sanctions measures now apply to designated individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban, wherever located, and result in a consolidated list of individuals and entities to whom the sanctions are to be applied.

52. As in the case of the regime pursuant to resolution 1373 (2001), it can be contested whether the sanctions regime pursuant to resolution 1267 (1999) is compatible with the powers of the Security Council under Chapter VII. In particular, such concerns relate to Security Council resolution 1390 (2002), which was adopted to modify resolution 1267 (1999) sanctions regime following the defeat of the Taliban rule in Afghanistan. This constitutes the first example of an open-ended resolution on sanctions, adopted under Chapter VII without any link to a specific territory or State. While resolution 1267 (1999) could be seen as a temporary emergency measure by the Security Council, using its Chapter VII powers to address a specific threat to peace and security, the regime is no longer limited in time or space. Meanwhile, the rapid progress in State ratifications of the International Convention for the Suppression of the Financing of Terrorism provides a proper legal basis for States' obligations in this field. Further, the actual effectiveness of the listing created pursuant to resolution 1267 (1999) in targeting appropriate persons for sanctions is far from proven. In its current form, the sanctions regime of the Security Council has been said to have judicial or quasi-judicial character.[39] In cases of doubt, legal determinations by the Security Council should always be limited to a particular situation and should be interpreted as being of a preliminary rather than a final character.[40] Such powers are difficult to reconcile with the legal order of the Charter,[41] and the provisions of its article 41.[42]

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[38] Including Security Council resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008) and 1904 (2009).

[39] See E. de Wet, *The Chapter VII Powers on the United Nations Security Council* (Portland, Hart Publishing, 2004), pp. 352-354.

[40] See F. Frowein and N. Krisch, "Introduction to Chapter VII" in *The Charter of the United Nations: a Commentary*, B. Simms, ed. (Oxford, Oxford University Press, 2002).

[41] Article 92 of the Charter clearly identifies the International Court of Justice as the principal judicial organ of the United Nations. In relation to the Security Council, see Keith Harper, "Does the United Nations Security Council have the competence to act as court and legislature?", in *Journal of International Law and Politics*, vol. 27, No. 1. Mr. Harper asks: "Should such a political institution, conferred with executive powers, answer purely juridical questions [...] when there are appropriate fora for the adjudication of such issues?".

[42] Although article 41 is phrased in permissive terms, it does not envisage the Council making legal determinations.

53. Targeted sanctions under the regime have come under frequent criticism by legal scholars and in the reports commissioned by international organizations,[43] and they have been challenged in legal proceedings.[44] Most concerns have been raised about procedural fairness and the absence of effective means for an individual to challenge a listing decision once made.[45] The 2005 World Summit Outcome called upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures existed for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions (see General Assembly resolution 60/1, para. 109). On 29 June 2010, the Security Council held a debate on the promotion and strengthening of the rule of law in the maintenance of international peace and security and addressed also the efficiency and credibility of sanctions regimes (see S/PRST/2010/11).

54. The Special Rapporteur has expressed concern that the listing practice created pursuant to resolution 1267 (1999) has had a serious impact on due process-related rights for individuals suspected of terrorism, as well as their families (see A/63/223, para. 16, and A/HRC/17/6/Add.2, paras. 33-36). In his 2008 report to the General Assembly, he argued that because of the indefinite freezing of the assets of those listed, the listing amounted to a criminal charge owing to the severity of the sanction (A/63/223, para. 16). In 2006, the Special Rapporteur highlighted a number of basic principles and safeguards to be respected and applied in order to bring the listing procedures in line with generally accepted human rights standards (ibid.). The Special Rapporteur further noted that the listing was often the result of political decisions taken by the diplomatic representatives of States within political bodies, based on classified evidence not necessarily evenly shared between the deciding States.

55. The regime has been subject to a number of reforms by the Security Council, including incremental improvements in respect of the status of affected individuals, such as the notification of listed individuals (see Security Council resolution 1735 (2006), paras. 10 and 11), the dissemination of statements and narrative summaries of reasons for listing (see Security Council resolution 1822 (2008), para. 12) and the mandatory review of all entries on the list (ibid., paras. 25 and 26). The Special Rapporteur welcomes the recent adoption of resolution 1904 (2009), in which the Council brought about further improvements to Committee procedures for listing and de-listing and established an Office of the Ombudsperson to receive requests from individuals and entities seeking to be removed from the consolidated list (see

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[43] See, for example, Bardo Fassbender "Targeted sanctions: listing/de-listing and due process", study commissioned by the Office of Legal Affairs, United Nations (2006); I. Cameron, "The European Convention on Human Rights, due process, and the United Nations Security Council counter-terrorism sanctions", report commissioned by the Council of Europe (2006).

[44] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008; *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006), final views of the Human Rights Committee, 22 October 2008.

[45] See Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights: Assessing Damage, Urging Action*, Geneva, International Commission of Jurists, 2008; I. Johnstone, "The United Nations Security Council, counter-terrorism and human rights", in *Counter-terrorism: Democracy's Challenges*, A. Bianchi and A. Keller, eds. (Oxford, United Kingdom, Portland, Oregon, United States of America, Hart Publishing, 2008).

para. 21 of the resolution). The other improvements include greater focus on information-gathering and flow of information between various actors; a strict timetable for the de-listing procedure, which limits the entire process to a maximum of six months; and the obligation of the Committee to provide explanatory comments when rejecting a de-listing request. In June 2010, Kimberly Prost, a Canadian judge, was appointed as Ombudsperson.[46]

56. Nonetheless, the Special Rapporteur remains concerned that the revised procedures for de-listing do not meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law.[47] Under resolution 1904 (2009), the Ombudsperson does not have the decision-making power to overturn the listing decision of the Committee. The Ombudsperson is not even mandated to make recommendations to the Committee, and de-listing decisions are still taken confidentially and by consensus of a political body (the Security Council Committee established pursuant to resolution 1267 (1999)), as opposed to being the result of judicial or quasi-judicial examination of evidence. Further, access to information by the Ombudsperson continues to depend on the willingness of States to disclose information, as States may choose to withhold information in order to safeguard their security or other interests. The system continues to lack transparency since there is no obligation for the Committee to publish in full the Ombudsperson's report or to fully disclose information to the petitioner. Without decision-making powers, the Ombudsperson cannot be regarded as a tribunal within the meaning of article 14 of the International Covenant on Civil and Political Rights.[48]

57. Through the work of the Security Council Committee established pursuant to resolution 1267 (1999), the Security Council has taken on a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of the right to fair trial as reflected in international human rights treaties and customary international law. For these reasons, the Special Rapporteur considers that sanctions regime to amount to action ultra vires, and the imposition by the Council of sanctions on individuals and entities under the current system to exceed the powers conferred on the Council under Chapter VII of the Charter.

58. As long as there is no independent review of listings at the United Nations level, and in line with the principle that judicial or quasi-judicial decisions by the Security Council should be interpreted as being of a preliminary rather than final character, it is essential that listed individuals and entities have access to the domestic judicial review of any measure implementing the sanctions pursuant to resolution 1267 (1999).[49] Indirect review in relation to acts by an individual State or by the European Union has been exercised by the Human Rights Committee in the case of *Sayadi and Vinck v. Belgium*[50] and in the judgment by the European Court of

[46] See http://www.un.org/News/Press/docs/2010/sc9947.doc.htm.

[47] A similar assessment can be found in David Cortright and Erika de Wet "Human rights standards for targeted sanctions", Sanctions and Security Research Program. For an overview of the right to fair trial in the fight against terrorism, see document A/63/223.

[48] See also, *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others* (FC), [2010] UKSC 2.

[49] See also Martin Scheinin, "Is the ECJ Ruling in Kadi Incompatible with International Law?", in *Yearbook of European Law*, vol. 28 (Oxford University Press, 2010).

[50] See *Sayadi and Vinck v. Begium* (Communication No. 1472/2006), final views of the Human Rights Committee, 22 October 2008.

Justice in the cases of *Kadi and Al Barakaat*.[51] In paragraph 20 of its resolution 63/185, the General Assembly urged States, while ensuring full compliance with their international obligations, to include adequate human rights guarantees in their national procedures for the listing of individuals and entities with a view to combating terrorism. This statement should be seen as an appeal to States to implement sanctions against persons listed by the Security Council, not blindly, but subject to adequate human rights guarantees.

C. Field presences

1. Framing the issue

59. Since a United Nations operation exclusively dedicated to counter-terrorism has yet to be deployed, the Special Rapporteur has taken into consideration United Nations peacekeeping operations as a whole, as they represent the context where United Nations actors would directly be involved in counter-terrorism measures on the ground. It is problematic that the United Nations Global Counter-Terrorism Strategy does not address such direct involvement.

60. Instances of human rights violations during United Nations field operations have been documented by intergovernmental organizations, non-governmental organizations and the international press in the past. Additionally, United Nations responsibility has been addressed in litigations before regional human rights courts, with the outcome that neither the United Nations, nor the Member States in question were held to account.[52] International human rights courts have on a general level established the standard of "effective control" in order to attribute responsibility to international organizations and/or Member States.[53] In the opinion of the Special Rapporteur, this is the threshold that should trigger responsibility by the United Nations, but not to the exclusion of the responsibility of Member States for their own conduct. States remain responsible for aiding or assisting in the commission of an internationally wrongful act.[54]

61. Since United Nations operations necessarily involve action by individual Member States for which they remain responsible, the Special Rapporteur believes that the conduct of United Nations operations must comply with the substantive norms enshrined in core international human rights instruments, particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. With regard to the latter, United Nations operations in the field must be realized in a manner that minimizes negative impact upon human rights (e.g., access to education, social and health services, places of

[51] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008.

[52] European Court of Human Rights, admissibility decisions on *Agim Behrami and Bekir Behrami v. France* (Application No. 71412/01), and *Ruzhdi Saramati v. France, Germany and Norway* (Application No. 78166/01), 2 May 2007.

[53] European Court of Human Rights, *Loizidou v. Turkey (Application No. 15318/89)*, 18 December 1996.

[54] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), chap. IV, part one, article 16.

employment).[55] In terms of the former, the limits to power of States to derogate from human rights,[56] must apply also in the context of United Nations operations.

2. Selected substantive issues

62. Reports on several current[57] and past peacekeeping operations reveal that they have been realized with a considerable "human rights cost".[58] As the United Nations assumes powers akin to those of States, the bulk of the problems that arise relate to four core categories of issues: detention; fair trial, non-refoulement and the prohibition of torture or cruel, inhuman or degrading treatment.

63. Detention directly affects the right to liberty and security of individuals. International standards require that detention be neither unlawful nor arbitrary and that sufficient guarantees exist both at the time of arrest and throughout the whole period of detention. The conditions of detention and the treatment of detainees are regulated in international human rights law[59] so as to ensure that minimum standards are secured under any circumstances.[60]

64. Reports on United Nations operations over the past years have brought to light instances that fall short of the requirements established by articles 9 and 10 of the International Covenant on Civil and Political Rights.[61] Detention-related problems have also been reported, such as excessive length of pretrial detention, non-observance of the right to a fair trial within a reasonable time, lack of provision of legal assistance, ill-treatment of detainees and poor conditions of detention.[62]

65. The United Nations has been called upon to administer areas or operate in an environment where the legal regime in terms of applicable law is dubious and in terms of material resources insufficient or virtually non-existent. Several of the problems that have occurred in the past relate to the right to be tried within a

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[55] See A/HRC/6/17/Add.4, para. 39, and Corr.1, and Mac Darrow and Louise Arbour, "The pillar of glass: human rights in the development operations of the United Nations", *American Journal of International Law*, vol. 103 (2009), p. 475.

[56] See General Comment No. 29 of the Human Rights Committee.

[57] Currently, 15 operations are in place; see http://www.un.org/apps/news/html/resources.shtml.

[58] Reports of sexual exploitation of women and children are particularly alarming in this regard. For identification of issues and recommendations, see final report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24, paras. 78-80.

[59] See Economic and Social Council resolution 663C (XXIV) on standard minimum rules for the treatment of prisoners, General Assembly resolution 43/173, on "Body of principles for the protection of all persons under any form of detention or imprisonment", articles 9 and 10 of the International Covenant on Civil and Political Rights; Human Rights Committee, General Comment No. 8 and General Comment No. 21.

[60] Human Rights Committee, *Albert Womah Mukong v. Cameroon*, CCPR/C/51/D/458/1991, para. 9.3.

[61] Amnesty International, "Federal Republic of Yugoslavia (Kosovo): setting the standard? UNMIK and KFOR's response to violence in Mitrovica", EUR 70/013/2000 (2000). Available from http://www.amnesty.org/en/library/info/EUR70/013/2000/en.

[62] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, report to the United Nations Interim Administration in Kosovo (UNMIK) on the visit to Kosovo, 20 January 2009. Available from http://www.cpt.coe.int/documents/srb/2009-03-inf-eng.pdf.

reasonable time, inconsistent provision of legal assistance and flaws in the procedural aspects of trials.[63]

66. Article 33 of the Convention relating to the Status of Refugees and the provisions of international human rights treaties, including article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 7 of the International Covenant on Civil and Political Rights, prohibit refoulement of individuals when their lives and/or freedom would be threatened.[64] This relates also to situations of transferring a person to the hands of another entity, such as the authorities of the territorial State.[65] United Nations operational branches on the ground are under an obligation to ensure that individuals coming within their control benefit from this protection.

67. United Nations peacekeeping troops attempts to establish order in Somalia in 1993 were met with allegations of torture and various other serious human rights abuses, which were eventually verified.[66] Regrettably, the perpetration of those acts damaged the image of the United Nations as a human rights promoter and defender.

IV. Conclusions and recommendations

A. Conclusions

68. The increased attention paid by the General Assembly to the promotion and protection of human rights while countering terrorism is reflected in a number of resolutions adopted on the subject as well as in the United Nations Global Counter-Terrorism Strategy. In the framework of its Ad Hoc Committee (on terrorism) as well as the working group of the Sixth Committee, the General Assembly has continued its work in the field of codifying international law on terrorism, with the draft comprehensive convention on international terrorism remaining unfinished. The challenge remains to mainstream a human rights-based approach throughout all United Nations entities working on counter-terrorism related issues, including through the Counter-Terrorism Implementation Task Force and increase cooperation and integration with and between United Nations human rights entities, including the Human Rights Council, its special procedures and the United Nations High Commissioner for Human Rights and her Office.

69. The Special Rapporteur considers that whatever justification the Security Council may have had in September 2001 for the adoption of resolution 1373 (2001), its continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. Resolution 1373 (2001) goes beyond the powers conferred upon the Security Council and continues to pose risks to the protection of a number of international human rights standards.

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[63] Amnesty International, "Kosovo (Serbia and Montenegro): United Nations Interim Administration Mission in Kosovo (UNMIK): conclusions of the Human Rights Committee, eighteenth session, July 2006".

[64] See Human Rights Committee, General Comment No. 20, para. 9.

[65] See *Al-Saadoon and Mufdhi v. United Kingdom*, European Court of Human Rights, Chamber Judgment of 2 March 2010.

[66] See *Human Rights Watch World Report 1994: Somalia*, and *Amnesty International Report 1994: Somalia*.

70. Through the work of the Security Council Committee established pursuant to resolution 1267 (1999), the Security Council has taken on a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of due process as reflected in international human rights treaties and customary international law. The Special Rapporteur considers that the imposition by the Council of sanctions on individuals and entities under the current system exceeds the powers conferred upon the Council under Chapter VII of the Charter.

71. The Special Rapporteur is concerned about the lack of a holistic, coherent and comprehensive human rights strategy to address the responsibility under international law of the United Nations for its operations in the field. The current credibility gap that the United Nations is facing is damaging to its legitimacy in the field of human rights, which strikes at the very identity of the Organization.

B. Recommendations

General Assembly

72. The Special Rapporteur calls upon Member States, including through the General Assembly, and in line with their commitment to the United Nations Global Counter-Terrorism Strategy:

(a) To provide the United Nations system with resources and mandates to promote a human rights-based approach to counter-terrorism, to mainstream international human rights standards throughout all United Nations entities working on counter-terrorism related issues and to increase cooperation and integration with United Nations human rights entities;

(b) To carry forward the Strategy at the national level, ensuring the centrality of the respect for human rights and the rule of law as the fundamental basis of the fight against terrorism as set out in the Strategy, and to fully implement the specific human rights commitments spelled out in the annual resolutions of the Assembly on the protection of human rights and fundamental freedoms while countering terrorism;

(c) To continue to work towards the completion of the draft comprehensive convention on international terrorism, keeping in mind that only a legally precise definition of terrorism that respects the principle of legality and that is restricted to conduct that is truly terrorist in nature, will help stop the use of abusive national definitions;

(d) Through the General Assembly, in the context of reviewing the implementation of the Strategy and otherwise, to support the role of promoting and protecting human rights in any successful action against terrorism.

Counter-Terrorism Implementation Task Force

73. The Special Rapporteur encourages the Counter-Terrorism Implementation Task Force to take into account human rights considerations in all aspects of its work, in line with the United Nations Global Strategy on Counter-Terrorism, and ensure that each working group incorporates a human rights component and perspective.

Human Rights Council

74. The Special Rapporteur encourages the Human Rights Council to consider in a more systematic way the recommendations contained in the reports on human rights and counter-terrorism submitted by the Special Rapporteur and the United Nations High Commissioner for Human Rights in formulating concrete recommendations to States and in deciding its own course of action. He also calls for better coordination between the Human Rights Council, the General Assembly and the United Nations High Commissioner in order to bring about an increase in the overall share of the special procedures in the budget of OHCHR, so that he and other special rapporteurs will be able to pursue their mandates and meet the needs of the Human Rights Council.

Security Council

75. The Special Rapporteur calls upon the Security Council:

(a) To seize the opportunity of the approaching tenth anniversary of resolution 1373 (2001) to replace resolutions 1373 (2001), 1624 (2005) and 1267 (1999) (as amended) with a single resolution, not adopted under Chapter VII of the Charter, in order to systematize the counter-terrorism measures and reporting duties of States under one framework;

(b) As part of the reform, to replace the sanctions regime pursuant to resolution 1267 (1999) by advice and assistance to Member States in maintaining their national terrorist lists and in reporting on them, and on available due process guarantees;

(c) To include a proper human rights clause in the new resolution, along the lines of Security Council resolution 1822 (2008), thereby also affirming the duty of the United Nations itself to comply with international human rights law;

(d) To ensure that counter-terrorism action by the Security Council and its subsidiary bodies systematically reflects the double role of the promotion and protection of human rights in the United Nations Global Counter-Terrorism Strategy, namely as one pillar of the strategy and a component in all other pillars.

76. In respect of the systemic reform proposed above, the Special Rapporteur:

(a) Calls on States that apply sanctions pursuant to resolution 1267 (1999) to provide for a judicial review at the national level of implementing measures;

(b) Calls on the Security Council Committee established pursuant to resolution 1267 (1999) to: (i) fully consider suggestions made by the Ombudsperson regarding de-listing requests under resolution 1904 (2009); and (ii) fully cooperate with the Ombudsperson, including by providing all relevant information.

77. The Special Rapporteur also calls on the Counter-Terrorism Committee and its Executive Directorate:

(a) To improve the transparency of the work of the Committee by making public its conclusions and recommendations to States, while not exposing vulnerabilities to terrorism;

(b) To replace the generic human rights question posed to States pursuant to resolution 1624 (2005) with specific ones, based on the experience gained in respect

of the sensitive areas related to implementation of resolutions 1373 (2001) and 1624 (2005) and the specific human rights guidelines contained in the 2009 technical guide to the implementation of Security Council resolution 1373 (2001);

(c) To increase cooperation with the mandate of the Special Rapporteur in the field of country assessment and advice;

(d) To continue to take into account the findings of the Special Rapporteur from country visits and the findings of relevant human rights bodies in country assessments of the implementation of resolution 1373 (2001);

(e) To strengthen the role of human rights assessments in the day-to-day operation of the Counter-Terrorism Committee Executive Directorate, including through increased capacity within Directorate and closer cooperation with OHCHR.

Field presences

78. With a view to securing comprehensive monitoring of United Nations human rights obligations in its field operations, including any involvement in counter-terrorism operations, the Special Rapporteur:

(a) Invites the United Nations to consider the drafting of a uniform code of conduct for counter-terrorism and other field operations;

(b) Suggests the creation of a new, autonomous, ombudsperson body charged with oversight of the human rights aspect of United Nations operations, including those that have a counter-terrorism component;

(c) Calls upon the United Nations to elaborate a comprehensive human rights governance policy, applicable also in the counter-terrorism context.

79. For the implementation of the previous recommendation, the Special Rapporteur recommends the development of specific tools, including:

(a) A basic code of criminal procedure for United Nations troops, including the criminalization of the violation of human rights prescribed in the core international human rights instruments;

(b) A United Nations human rights manual for counter-terrorism operations based on the current best practices and policies of all States;

(c) A bulletin of the Secretary-General on the observance of international human rights law by United Nations forces, including identification of specific obligations therein;

(d) Inclusion in all future status-of-forces agreements of a standard human rights clause, in order to ensure that the perpetrators of human rights violations are held responsible by either the sending or receiving country.

80. The Special Rapporteur invites States to move towards the establishment of a world court of human rights endowed with a special *ratione personae* jurisdiction over the United Nations and its organs.